(4)

No. 09-538

Supreme Court, U.S.
FILED
MAR 30 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CONSUMERS' CHECKBOOK,
CENTER FOR THE STUDY OF SERVICES,
Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The D.C. Circuit's holding that there is zero public interest in the disclosure of records illuminating how the government reimburses private physicians through the Medicare program conflicts with the fundamental mission of FOIA and the case law interpreting it. That holding also has potentially staggering consequences. As the past year's vigorous debate over health insurance demonstrates, we live in an era of ever-expanding government expenditures, and huge programs such as Medicare, which already spends over $400 billion each year, are projected to only grow. The D.C. Circuit's holding, which would deny the public the ability to as-

sess for itself how the Department of Health and Human Services disburses Medicare funds, could not come at a worse time. It would set a dangerous precedent and should be reversed.

I. THE REQUESTED DATA WILL SHED LIGHT ON HOW THE GOVERNMENT SPENDS BILLIONS OF TAXPAYER DOLLARS IN THE MEDICARE PROGRAM

A. The D.C. Circuit Committed An Error Of Law That Was Material To The Outcome

The D.C. Circuit squarely held that a FOIA requester must link the requested information to a specific statutory agency duty in order to establish a public interest cognizable under FOIA's Exemption 6. Rather than defend this holding—which is indefensible—the government and the American Medical Association (AMA) attempt to minimize it, arguing that "that is neither what the court of appeals said, nor what it did." Gov't Opp. 9, *see also* AMA Opp. 10.

Respondents are incorrect. The D.C. Circuit plainly held that a connection to a specific statutory agency duty was required. Pet. App. 11a-12a. That error was material to the outcome: the D.C. Circuit rejected petitioner's argument that the requested data will further the public interest in information about the quality of care within Medicare on the ground that petitioners had not tied the requested data to a specific agency duty. *Id.* The court stated as follows:

> [Petitioner] argues that the requested data will indicate the quality of care being provided by Medicare-enrolled physicians and thereby permit the public to assess how well [the Centers for Medicare and Medicaid Services (CMS)] is fulfilling its statutory duty to promote quality.

> But we fail to see how the requested data will allow the public to evaluate the performance of any specific quality-promoting programs CMS has a statutory duty to undertake.

Pet. App. 11a. After the quoted passage, the D.C. Circuit reviewed specific statutory duties and concluded that the data would not shed light on the government's compliance with any of those duties. *Id.* at 11a-12a. The D.C. Circuit's holding is clear: because the requested information was not tied to a specific statutory duty, there could be no public interest in its disclosure. The D.C. Circuit's error consisted not in a mere "truncated recitation of the canonical formulation" of the relevant test (Gov't Opp. 10 n.2), but in its grafting a new requirement with no basis in this Court's precedent and then deciding the case before it on the basis of its new rule, with profound real-life consequences.

The D.C. Circuit's holding sets a dangerous precedent. Agencies often act pursuant to general authorities, not specific, narrow statutory mandates, as in this case, where CMS has a general duty to promote quality in the Medicare program. *See* Pet. 19-22. Holding that there is no public interest in the release of data in the absence of a specific statutory duty makes no sense and runs contrary to FOIA's " 'general philosophy of full agency disclosure.' " *Department of Air Force* v. *Rose*, 425 U.S. 352, 360-361 (1976). The D.C. Circuit's holding in this case threatens to undermine this philosophy, and should be reversed.

B. The Requested Information Sheds Light On The Government's Compliance With Its Duties To Promote Quality And Prevent Fraud In Medicare

In addition to attempting to minimize the error committed by the D.C. Circuit, respondents argue that petitioner failed to establish a sufficient nexus between the requested data and the asserted public interest. Although such a nexus must exist, *see National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172-173 (2004), respondents and the D.C. Circuit would require a showing so detailed that few FOIA requesters could ever hope to satisfy it. This unprecedented requirement of a heightened showing required by the D.C. Circuit—and defended by respondents—has no basis in precedent and runs contrary to FOIA's objective of openness in government.

The D.C. Circuit held that petitioner had failed to link the requested data to the asserted public interest in two respects. First, the court held that petitioner's claim that the requested data will shed light on the quality of care in Medicare "rests on the assumption that the frequency with which a physician performs a medical procedure indicates the quality of the procedure." Pet. App. 9a; *see also* Gov't Opp. 13; AMA Opp. 10. The court did not deny that that position has substantial support in scientific literature. Nonetheless, it treated as dispositive that "[t]he medical community has not reached a consensus" on the point, and that the requested information would not reveal the *total* volume of procedures performed by physicians (because it would not include procedures performed for non-Medicare patients). Pet. App. 9a-10a; *see also* Gov't Opp. 13; AMA Opp. 10. Second, the D.C. Circuit held that a Government Accountability Office (GAO) report

stating that "[s]ince 1990, GAO has considered Medicare at high risk for fraud, waste, abuse, and mismanagement"[1] was somehow insufficient to "raise a cognizable public interest under FOIA in verifying that CMS is adequately detecting fraud" (Pet. App. 13a; *see also* Gov't Opp. 14-15; AMA Opp. 13-14).

Both conclusions lack support in the FOIA case law. Although this Court has stated that a "totally unsupported suggestion" of government misfeasance is not sufficient to invoke a public interest under FOIA, *see Department of State* v. *Ray*, 502 U.S. 164, 179 (1991), that is hardly the situation here. The high incidence of fraud in Medicare is a matter of public record. *See* Pet. 4-5 & nn.3-6. The fact that the GAO—a government agency—has recognized the severe danger of Medicare fraud should be dispositive.

The court similarly erred in turning aside petitioner's argument that the requested data will shed light on CMS's efforts to promote quality in the Medicare program. Legitimate scholarship—including a recent paper by the White House Council of Economic Advisers—supports the view that there is a strong correlation between quantity and quality of medical procedures performed. *See* Pet. 6-7, 22-24 (citing Executive Office of the President, Council of Economic Advisers, *The Economic Case for Health Care Reform* 16 (June 2009), *at* http://www.whitehouse.gov/assets/documents/CEA_Health_Care_Report.pdf). Nothing in FOIA requires petitioner to establish to a scientific certainty that quantity correlates to quality for the data to be

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[1] GAO, *Medicare Integrity Program: Agency Approach for Allocating Funds Should Be Revised*, GAO-06-813 at *Highlights* (Sept. 2006), *at* http://www.gao.gov/new.items/d06813.pdf.

relevant to the public interest. The fact that there is legitimate debate on the point should suffice to establish an entitlement to the data.

More fundamentally, the D.C. Circuit's ruling is not faithful to the precept that, under FOIA, it is for the *public* to decide whether information in government files provides a basis for a call to action or reform. The very reason for requesting data under FOIA is often to allow the public to evaluate whether additional steps are necessary to further the public interest. Nor must a requester prove that the requested information will establish conclusively that the government has failed in one of its duties. Since the requested information is not already in the public domain, requesters cannot be expected to offer detailed evidence of what the data will show. It is for this reason that the data need only "*shed*[] *light*" on the government's activities, *Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U.S. 749, 773 (1989) (emphasis added), consistent with FOIA's purpose to " 'open agency action to the light of public scrutiny,' " *Rose*, 425 U.S. at 361. Indeed, the D.C. Circuit itself has previously focused on "the *incremental* value of the specific information being withheld." *Schrecker* v. *Department of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) (emphasis added); *see also* Pet. App. 22a-23a (Rogers, J. dissenting).

Under the proper standard, there can be little doubt that the requested data will shed light on CMS's activities. Data tying procedures performed to individually-identified physicians will allow the public to determine whether CMS is issuing reimbursements for procedures for which those physicians have insufficient training or certification. In addition, the number of procedures performed by a given doctor is at least relevant to CMS's efforts to promote quality in Medi-

care. The government acknowledges that procedure volume is at least a component of the quality analysis that CMS itself performs. *See* Gov't Opp. 15 n.6 ("CMS uses *much more than* procedure volume to implement 42 U.S.C. 1395y(a)(1)(B), which precludes reimbursement for services that 'are not reasonably and necessary for the prevention of illness.' "(emphasis added)). It follows that procedure volume "sheds light" on CMS's activities. *Reporters Comm.*, 489 U.S. at 773.

Knowing the number of procedures performed by particular doctors in a given time period will also shed significant light on CMS's efforts in combating fraud in Medicare, and on how successful those efforts have been. With the requested data, petitioner will be able to establish, for example, the number of procedures billed using identification numbers of doctors who are unlicensed or even dead. Such billing information surely sheds more light on the government's efforts to combat fraud than does the mere knowledge that a deceased physician is enrolled in the Medicare program. *See* Gov't Opp. 15-16. Data on the number of procedures billed in a given time period will also show if a physician is billing for procedures outside of his practice area or billing for an inordinate number of procedures in a given time period (surely, billing for 200 heart bypass procedures a day would be a strong indicator of fraud, *e.g.*). For these reasons, it is clear that the requested data will "shed[] light" on CMS's efforts to promote quality and prevent fraud in Medicare. Nothing more is required.

Congress's recent enactment, as part of the new healthcare reform law, of a provision permitting the release of Medicare claims data also undermines the D.C. Circuit's holding that there is zero public interest in release of that data. Section 10332 of the Patient Protec-

tion and Affordable Care Act (PPACA) calls for the release of "claims data under [Medicare] parts A, B, and D for items and services furnished under such parts for one or more specified geographic areas and time periods." Pub. L. No. 111-148 (H.R. 3590), § 10332, 124 Stat. 119, 968 (2010) (permitting release of claims data to "qualified entities ... for the evaluation of the performance of providers of services and suppliers;" imposing restrictions upon qualified entities on the uses to be made of the data). The enactment of Section 10332 of PPACA, which takes effect in 2012, reflects Congress's understanding that the release of such data is in the public interest. This Congressional judgment is irreconcilable with the D.C. Circuit's finding of no public interest in this case.

II. The Great Public Interest In Disclosure Clearly Outweighs Any Privacy Interest In The Data

Once the compelling public interest in disclosure of the requested records is recognized, it is clear that it greatly outweighs any privacy interest at issue. Exemption 6 to FOIA exempts records from disclosure only if disclosure "would constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). The balance is thus tilted heavily in favor of disclosure. *See Ray*, 502 U.S. at 177.

Any privacy interest in the requested data is attenuated. First, the requested information pertains only to the receipt of government funds.[2] The re-

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[2] The cases cited by the government do not establish that the fact of government funding is irrelevant to the privacy analysis. *See* Gov't Opp. 12 n.3. Those cases involved a particular concern

quested data also does not reveal physicians' take-home earnings, total income, or net income after expenses. Indeed, the AMA itself states that "Medicare payments compose, on average, some 25 percent of physicians' income." AMA Opp. 17 (citing GAO, *Medicare Physician Fees, Geographic Adjustment Indices Are Valid in Design, but Data and Methods Need Refinement*, GAO-05-119, at 4 (2005)). Thus, at most the requested data can be used to derive an uncertain fraction of physicians' earnings. Any ensuing invasion of physicians' privacy does not clearly outweigh the compelling public interest in understanding how the government spends taxpayers' money in a program as susceptible to fraud as Medicare.

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with disclosure of the home addresses of persons receiving funds from the government that is not present here. *See Painting & Drywall Work Preservation Fund, Inc.* v. *Department of Housing & Urban Dev.*, 936 F.2d 1300, 1302 (D.C. Cir. 1991) ("the records at issue here involve ... names, addresses, [and] a full weekly accounting of hourly wages, hours worked, deductions, and net pay"); *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989) (finding privacy interests in names and home addresses of federal retirees likely to become targets of marketing campaigns "for all the special goods, services, and causes likely to appeal to financially secure retirees"); *Painting Indus. of Haw. Mkt. Recovery Fund* v. *Department of Air Force*, 26 F.3d 1479, 1484 (9th Cir. 1994) (exhibiting concern with records tying workers' names and home addresses to payroll figures); *Hopkins* v. *Department of Housing & Urban Dev.*, 929 F.2d 81, 87 (2d Cir. 1991) ("individual private employees have a significant privacy interest in avoiding disclosure of their names and addresses").

III. The Florida Injunction Has No Application To The Majority Of The Records In This Case Even If Read Broadly

Respondents point to an injunction entered by a Florida district court in 1979 as an independent reason for the Court to deny review in this case. AMA Opp. 17-20; Gov't Opp. 18; *see Alley* v. *Department of Health & Human Servs.*, 590 F.3d 1195 (2009) (concluding that the Florida injunction bars disclosure of similar records). That argument is unavailing.

First, the panel majority in the D.C. Circuit did not address the injunction. *See* Pet. App. 4a n.3. It cannot be presumed that the D.C. Circuit would conclude that the injunction bars disclosure of the records requested at all.

Second, even read broadly, the Florida injunction *at most* bars disclosure of information relating to the class certified in that case—Florida physicians and AMA members. *See* C.A.J.A. 295-296; *Florida Med. Ass'n, Inc.* v. *Department of Health, Educ. & Welfare*, 479 F. Supp. 1291 (M.D. Fla. 1979) (accompanying opinion). The injunction therefore has no application to the majority of the records requested in this case. The majority of physicians whose data is at issue in this case are not members of the recertified class to which the Florida injunction applies. Petitioner requested data pertaining to physicians practicing in Washington, D.C., not those licensed to practice in Florida. Further, according to one source, only 26 percent of licensed physicians in the United States were members of the AMA in 2004, and respondents have not shown otherwise. Peck, *AMA: Membership Bounces Back Slightly*, MedPage Today (June 12, 2006), *at* http://www.medpagetoday.com/PublicHealthPolicy/PracticeManagement/

3516; *see* Pet. C.A. Br. 43 & n.29. It follows that the Florida injunction does not even address the majority of records at issue in this case. *See* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."); Pet. App. 35a (Rogers, J., dissenting). Reversal of the D.C. Circuit's judgment will result in the immediate release of a majority of the records at issue here, which plainly fall outside the scope of the Florida injunction.

* * * * *

The D.C. Circuit's ruling would set a dangerous precedent for Exemption 6 law and FOIA jurisprudence generally. It would undermine the basic philosophy of openness reflected in FOIA and erect, without foundation, a possibly insurmountable hurdle in many cases to disclosure of needed information regarding the workings of the government. Review by this Court is needed to ensure that the public may inform itself about the government's stewardship of public funds.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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